QUEK CHEK YEN

v.

DISTRICT COUNCIL KULAI

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[ORIGINATING SUMMONS NO. 31-1015 OF 1987]
27 APRIL 1989

PUBLIC SERVANTS: *Local authority - Plaintiff's service terminated in 1972 - Suit complaining of dismissal was decided in 1985 - Service circular granting pension benefits backdated to 1970 - Whether plaintiff entitled to termination benefits including pension - Whether action filed late.*

The plaintiff was formerly employed as the secretary of the Kulai Local Council for 19 years up to 19 October 1972 when he was dismissed from his job. As a result of his dismissal he filed a suit in 1973. Judgment was delivered in 1985.

The Supreme Court held that the one month notice to the plaintiff was not fair and equitable but a notice of six months would be so. The plaintiff was subsequently dismissed by a six months notice. It was accepted that on no account was the plaintiff's service terminated on disciplinary grounds.

The Federal Government, by service circular no. 1 of 1975, effected a change of service conditions stipulating that, satisfying certain conditions, all employees of local authorities of 10 years service were eligible for pension benefits.

The application of the circular was backdated to 1970 except for employees whose services were terminated on disciplinary grounds or on the grounds that they had been convicted in criminal Courts.

The plaintiff filed a notice of motion dated 17 October 1987 and prayed for a declaration that he is entitled to and ought to be considered for terminal benefits including pension rights in accordance with the new terms and conditions of service as are applicable to employees, both past and present, of local authorities.

Held:

[1] The people who benefit in respect of pensions are normally those serving officers and officers who eventually qualify for it, either those who are entitled to exercise their optional retirement or those who retire by the force of law when reaching the age of 55 years. By the same token, this will naturally exclude those officers who are no longer in service, whether they had left either by resigning voluntarily or those who are dismissed from service. The logical interpretation of back-dating the circular to 1970 would only cover those who reached retirement age on that date.

[2] There was also substance in the contention that this action had been filed too late, more than six years after the cause of action arose in 1975, by virtue of the circular. This originating summons was filed in 1987.

[Plaintiff's action dismissed with costs. Costs to be taxed.]

Cases referred to:
Quek Chek Yen v. Majlis Daerah Kulai [1986] 2 MLJ 290
Government of Malaysia v. Dato Chong Kok Lim [1973] 2 MLJ 74
Louis Dreyfus v. Aruna Chalaayya [1931] 58 IA 381

For the plaintiff - C.K.G. Pillay; M/s. Hassan Yunos & Co.
For the defendant - Teh Poh Teik; M/s. Abdul Raman Saad & Associates

JUDGMENT

Abu Mansor Ali J:

By the plaintiff's notice of motion no. 1015 of 1987 dated 17 October 1987 he prayed for a declaration that the plaintiff is entitled to and ought to be considered as eligible for termination benefits including pension rights in accordance with the new terms and conditions of service as are applicable to employees, both past and present, of local authorities.

I heard this matter in Open Court on 15 March 1989 and after which I reserved judgment. I now give my decision.

It can be stated with some fervour that the notice of motion of the plaintiff raises only one issue. Having regard to all what had transpired and on the evidence before me, is the plaintiff entitled to and ought to be considered as eligible to terminal benefits including pension from his former employer, the District Council Kulai.

A lot of the facts are undisputed before me. The plaintiff was formerly employed as the secretary of the Kulai Local Council for 19 years from 10 March 1953 to 19 October 1972. On this 19 October 1972 the plaintiff was dismissed from his job. It is important to note at the time of the plaintiff's dismissal the plaintiff's employer was operating under the Local Government Act 1952.

As a result of his dismissal he filed a suit in the High Court Johore Bahru No. 112/73 (1973 suit) complaining of his dismissal. In the checkered history of the case, it was heard on 23 May 1979 after 6 years' delay, judgment was finally delivered on 27 February 1985.

It was common ground that a number of intervening events had an effect on the plaintiff's position. They were:

1. The Local Government Act 1952 gave way to the Local Authorities Act 1967;
2. The Federal Government had effected a change of service conditions to the effect that subject to employees satisfying certain conditions all employees of local authorities of 10 years' service are eligible for pension benefits;
3. The relevant service circular applicable to the plaintiff's service (if not to the plaintiff) was the service circular no. 1 of 1975;
4. The application of the said circular was back-dated to 1970 - except for two categories of employees:
   (a) those employees whose services had been terminated on disciplinary grounds;
   (b) those whose services had been terminated on the ground that the employees had been convicted in Criminal Courts.
5. The decision of the learned Judge in the 1973 case was appealed against by the plaintiff to the Supreme Court which held in the circumstances the notice to the plaintiff of one month was not fair and equitable but a notice of 6 months would be so.

6. The plaintiff was subsequently dismissed by a six months notice.

In the argument before me, the plaintiff contends that it was clear in the judgment of both the High Court Judge and the decision of the Supreme Court that the plaintiff's dismissal was not on the ground of his misconduct or the ground of disciplinary proceeding against him. It cannot be denied that the plaintiff's employer in dismissing him was exercising a contractual right but the notice of one month was held to be too short. He was subsequently dismissed with proper 6 months' notice. I accept the position that on no account was the plaintiff's service terminated on disciplinary grounds.

The second and very material contention of the plaintiff was that the plaintiff contended that before the Supreme Court, it was with the consent of parties represented by Counsel that the question of pension of the plaintiff was a non-issue since at the date of the plaintiff's claim, the condition of service of the plaintiff did not provide for pension payment but the service became pensionable in 1975 back-dated to 1 January 1970.

The plaintiff's Counsel maintains that the question of pension was a non-issue by providing the transcript of the notes of evidence of the learned Judge of the Supreme Court minuting the same.

On the other hand, the present Counsel for the defendant submitted that the sum total of the prayers of the plaintiff includes a claim for pensions of the plaintiff and even in the judgment of the Supreme Court *Quek Chek Yen v. Majlis Daerah Kulai* [1986] 2 MLJ 290 states that at p. 294:

> The unfortunate aspect of this case is that while the case was pending before the trial Judge the Government decided to make all local council employees permanent and pensionable officers and the Government Circular No. 1 of 1975 made that decision retrospective from 1 January 1970. The appellant had contended that had it not been for the termination of service he would have been made a permanent and pensionable officer. We can only say that our sympathies are with him. The circular was issued in 1975 and at that time the appellant's employment had already been lawfully terminated.

The respondent's Counsel also submitted that because of the Supreme Court judgment, this matter of the plaintiff's claim is *res judicata*. He cited *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74, 76 which held that parties cannot raise for a second time in the same suit on issue that had already been determined either expressly or by necessary implication (see *Louis Dreyfus v. Aruna Chalaayya* [1931] 58 IA 381).

The contention of the parties itself raised two issues:

(i) Was the question of pension a separate non-issue?

(ii) Is the plaintiff's claim affected by *res judicata*?

I am clear from the notes taken by their Lordships of the Supreme Court at the hearing of the appeal before them, that the parties had agreed that the question of pension, very clear to all, was to be a subject of a separate suit. A suit must be taken to mean a claim of a party on the date and time it was filed. When the 1973 suit was filed, it pleaded and prayed for all the benefits, arrears of allowance and all accounts due, it could not be taken to mean that the plaintiff was also claiming for pension as possibility of pension was made only in circular no. 1 of 1975. I therefore do not accept that "all benefits" as pleaded in the 1973 suit, include pension. As for the Supreme Court judgment having made reference to plaintiff not being entitled to pension at that time, it must be taken that the Supreme Court did not mean that the plaintiff

would be estopped from claiming especially so after having got assurance from the plaintiff that it was going to be made a subject of a separate suit. Any other interpretation would be inconsistent with what was so agreed between the parties in this respect. The question of *res judicata* does not arise.

Having said that I have still to answer the substantive question, is the plaintiff entitled to the prayer asked for in the notice of motion.

The respondent in their opposition of the plaintiff's motion advanced two other grounds. In their second ground, they say that at the time circular no. 1 came into force in 1975, the plaintiff had already been dismissed by the termination notice in October 1972.

I find there is substance in the argument of the respondent on this second ground. On the proper application of the circular no. 1 of 1975, who are the persons who would be eligible to benefit from it. I have no hesitation in saying that the people who benefit in respect of pensions are normally those serving officers and officers who eventually qualify for it, either those who are entitled to exercise their optional retirement or those who retire by the force of law, when reaching the age of 55 years. By the same token, I am of the view that this will naturally exclude those officers who are no longer in service whether they had left either by voluntarily resigning or those who are dismissed from service. I am of the view also that the logical interpretation of back-dating the circular to 1970, would only cover those who reached retiring age on that date. Then the circular pertaining to pension will be implemented in their case but not if that particular person had, for example, been dismissed.

I also found substance in the respondent's last ground that this action had been filed too late, more than 6 years. I am with the respondent's Counsel that the cause of action arose in 1975 by virtue of that circular. This originating summons was filed in 1987. If we were to take the position when the notice of termination was given, it is more remote in time. It was contended by the plaintiff that at the Supreme Court it was agreed that the matter of this pension can be the subject of a separate suit. I cannot take it that the respondent was waiving the period of limitation there. I take it to mean that the plaintiff may file a separate suit in respect of pensions but it will still be subject to the suit being properly brought in good time.

For reasons I have given, I find that the plaintiff was not entitled to the declaration prayed for. Plaintiff's action is dismissed with costs to be taxed.

Also found at [1990] 1 CLJ 130